Supreme Court, U.S.
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No. 02-1143

IN THE

Supreme Court of the United States

JOSEPH P. PEROT, SR.,

Petitioner,

v.

McDONALD'S CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT McDONALD'S CORPORATION

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LIST OF PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Petitioner:
Joseph P. Perot, Sr.
4908 Tamarisk Street
Bellaire, Texas 77401

Respondent:
McDonald's Corporation
McDonald's Plaza
Oakbrook, Illinois 60523-1900

Co-defendant at trial:
Stewart Title Company
1980 South Post Oak
Houston, Texas 77056

It is unclear whether Stewart Title Company was excluded by Petitioner but the Petition does raise some issues regarding Stewart Title. None are persuasive.

McDonald's Corporation is publicly traded and has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

The Petition should be denied because it fails to satisfy any of the jurisdictional criteria set forth in SUPREME COURT RULE 10. The Petition presents no claim of a conflict in rulings among the Circuit Courts of Appeal or between the Fifth Circuit Court of Appeals and the Texas Supreme Court. No question of federal substantive law is presented. The primary question posed by Petitioner is one of federal procedural law, as to which there is no disagreement among the courts.

In addition, the Petition contains several material misstatements of law and fact, to which McDonald's objects. To assist the Court, McDonald's offers several key points of clarification:

1. As is clear from the Opinion of the Fifth Circuit Court of Appeals attached as Appendix "A" to the Petition, this case does *not* arise in connection with any court's attempt to "enforce" a "settlement offer" as claimed on page 4 of the Petition. This case is merely an attempt by Petitioner to revive dismissed and time-barred contract claims against McDonald's which were previously raised in an earlier lawsuit in the same District and Division (Cause Number H-96-1013), as Judge Harmon carefully explained in her January 10, 2002 Order of Dismissal [Appendix "B" to the Petition and, hereinafter, the "Order of Dismissal"].

2. Petitioner also incorrectly argues that Judge Harmon dismissed his claims against McDonald's for lack of subject-matter jurisdiction [Petition at page 5]. As the Order of Dismissal clearly shows, Petitioner's claims against McDonald's were dismissed by Judge Harmon, both because

the same claims were disposed of in the earlier lawsuit in 1997, and because the claims are now time-barred [Order of Dismissal, page 4].

3. Finally, Petitioner incorrectly argues that Judge Harmon deprived herself of subject-matter jurisdiction to make any further rulings as to Petitioner or McDonald's by first dismissing a dispensable co-defendant, Stewart Title Company, for lack of diversity.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Petitioner's Complaint for failure to state a claim. The current Complaint duplicated nearly *verbatim* an earlier Complaint in a case brought by Petitioner against McDonalds and dismissed by United States District Judge Kenneth Hoyt in 1997. Judge Hoyt's earlier dismissal bars the relitigation of these claims in the present action.

The District Court also properly dismissed the Complaint in this case because all asserted claims were obviously time-barred, based on the factual averments in the Complaint.

In dismissing this case for failure to state a claim, the District Court did not disregard Judge Hoyt's earlier ruling. In fact, the dismissal of this case is based in part on the effect of Judge Hoyt's dismissal of the prior case.

REASONS FOR DENYING THE WRIT

1. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT.

Petitioner's fundamental argument is grounded upon the claim that the District Court had no subject matter jurisdiction to rule on McDonald's Motion to Dismiss. The premise of this argument is that the District Court "deprived" itself of subject matter jurisdiction by first finding that Petitioner and Stewart Title Company were non-diverse - thereby destroying the single basis for subject-matter jurisdiction asserted by Petitioner in his Complaint.

This argument ignores the well-settled rule that a district court may dispose of obviously barred claims against a defendant after dismissing a non-diverse and dispensable co-defendant. FED. R. CIV. P. 21 permits the court to dismiss non-diverse and dispensable defendants in order to preserve diversity subject-matter jurisdiction as to the remaining parties at any stage of the proceedings. This enables the trial court to dispose of obviously barred or improper claims without the need for an additional lawsuit and the attendant waste of judicial resources. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989); *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597 (7th Cir. 2002); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150 (9th Cir. 1998); *LeBlanc v. Cleveland*, 248 F.3d 95 (2d Cir. 2001); *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (5th Cir. 1976).

It is undisputed that Stewart Title Company was merely the escrow agent for certain funds deposited by McDonald's in connection with the now terminated agreements between

Petitioner and McDonald's which form the basis for this lawsuit. Stewart Title Company had no claim to the escrowed funds and was sued simply because it refused to release the funds to Petitioner. Moreover, Petitioner makes no argument that Stewart Title Company was an indispensable or even necessary party to this proceeding.

The District Court was well within its power to preserve subject-matter jurisdiction of the case by dismissing Stewart Title Company for lack of diversity. Moreover, Petitioner does not attack the dismissal of Stewart Title Company *per se*. He merely argues that the dismissal of Stewart Title Company for lack of diversity somehow prevented the District Court from preserving subject-matter jurisdiction of the remaining parties and claims. This is simply erroneous.

Having properly taken steps to preserve jurisdiction of the subject matter of the lawsuit, the District Court next found correctly that Petitioner had litigated the same dispute against McDonald's in a prior-filed case before another District Judge in the same District and Division. The prior Complaint and the pending Complaint were virtually identical [Order of Dismissal, page 2]. Petitioner averred in both Complaints that his claims for relief arose by reason of a transaction occurring in 1995, more than four years prior to the filing date of this suit [*Id.*]. The District Court was, thus, presented with two obvious grounds compelling dismissal and a procedural mechanism enabling it to do so.

2. The District Court and the Court of Appeals did not Disregard the Earlier Ruling of Judge Hoyt.

In contrast to Petitioner's argument that Judge Harmon ignored Judge Hoyt's earlier order of dismissal, the Order of Dismissal was expressly based in part on the *effect of* the earlier ruling of Judge Hoyt in the first lawsuit filed against McDonald's. Judge Harmon found that, since the earlier lawsuit raised the same claims against McDonald's, the dismissal of that lawsuit which was never appealed by Petitioner barred this action against McDonald's [Order of Dismissal, page 2].

Judge Hoyt conditionally dismissed the earlier case after announcement of settlement by Petitioner in open court [Order of Dismissal, page 2]. Petitioner was ordered to file a final judgment reflecting the settlement within ninety days after the announcement. [*Id.*] The case was then involuntarily dismissed because Petitioner failed to file a final judgment and instead moved to reinstate the case. Judge Hoyt denied Petitioner's Motion to Reinstate and Petitioner then took no steps to appeal the dismissal [Order of Dismissal, page 4].

While his conduct in the first lawsuit may be viewed as the product of some ignorance or confusion with respect to the effect of Judge Hoyt's dismissal order, it remains indisputable that Petitioner elected not to appeal that order and is bound by his election.

Separately, the present Complaint raises issues, which are based on factual averments concerning transactions occurring in 1995, more than four years prior to the filing of this lawsuit in 2001. Thus, the Order of Dismissal also noted that dismissal was required because the Complaint on its face

clearly demonstrates that all claims for relief are barred by the applicable statutes of limitation, TEX. CIV. PRAC. & REM. CODE §§ 16.003 and 16.004 [Order of Dismissal, page 4]. Therefore, even if the first lawsuit had never been filed in Judge Hoyt's court, this case would have been the proper subject of the Order of Dismissal issued by Judge Harmon, because all stated claims were time-barred.

CONCLUSION

The District Court's Order of Dismissal was proper and without error. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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